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No. 06-157

IN THE

Supreme Court of the United States

JAY HEIN, Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORODO, FLORIDA, MICHIGAN, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

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INTEREST OF *AMICI CURIAE*

State officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions and/or programs on Establishment Clause grounds. From the states' perspective, vigilance concerning Article III standing is required to avoid turning federal courts into fora "in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U.S. 83, 106 (1968). Even more to the point, maintaining proper limits on federal-court standing is also necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006). And, as the Court confirmed in *DaimlerChrysler*, state-taxpayer plaintiffs have no better federal-court standing than federal-taxpayer plaintiffs. *See id.* at 1863-64.

For these reasons, the *amici* states, like the federal government, have a strong interest in ensuring that federal courts are limited to their proper judicial role, as justified by the text, history, and structure of Article III and the First Amendment, in adjudicating Establishment Clause cases.

SUMMARY OF THE ARGUMENT

A well-known episode of constitutional history is James Madison's failure to persuade the delegates in Philadelphia to vest power in a Council of Revision that would have had the specific duty of determining the constitutional validity of congressional acts. *See* 1 Max Farrand, *The Records of the Federal Convention of 1787* 21, 97-98, 108-10, 138-40 (1911); 2 Max Farrand, *The Records of the Federal Convention of 1787* 73-80 (1911). Instead, the Framers enabled federal courts to hear only "cases" and "controversies." *See* U.S. Const. art. III, § 2, cl. 1. With every expansion of those terms, however, "[t]here is every

reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government" and "go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting).

The rule announced by the Seventh Circuit in this case, which would permit taxpayers to challenge executive-spending decisions in addition to legislative decisions. It would then would move the Court incrementally closer to becoming a Council of Revision, but, in light of subsequent Establishment Clause incorporation, "one with even more power than in the rejected version, for it would thereby have a mechanism for a ready check on *state* as well as federal legislation." Earnest J. Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 Sup. Ct. Rev. 1, 16 (1963) (emphasis added).

When a federal-court plaintiff identifies no direct injury, general complaints about state-government fiscal decisions should be handled through political, rather than judicial, processes. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982). Undertaking judicial review based merely on a plaintiff's general interest in appropriate government expenditures improperly exalts judicial power over state governments as well as the other branches of the federal government.

The *amici* states urge the Court to consider how the decision in this case might affect state programs and other state activities. Many states, like the federal government, spend money from general appropriations on conferences—similar to the White House Office of Faith-Based and Community Initiatives conference at issue here—to educate religious (and other) groups about applying for and

administering government grants. In addition, state officials frequently participate in religious celebrations as part of their ceremonial duties. If taxpayers are permitted to challenge discretionary executive-branch expenditures on Establishment Clause grounds, any expenses that states incur when conducting these activities might become the subject of a federal-court lawsuit.

Expanding federal judicial power to supervise these state-government programs and activities would transgress important federalism principles. The Court has repeatedly relied on federalism concerns to resist invitations to expand federal-court authority over the states. The Court has invoked federalism when rejecting taxpayer standing to sue state officials, *see DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006), when rejecting specific equitable remedies against state officials, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983), and when discussing standing more generally. *See Valley Forge*, 454 U.S. at 476. So too, in this case, the Court should resist an invitation to expand federal-court standing in light of the impact the decision will have on co-sovereign state governments.

Finally, the time has come to overrule *Flast*, particularly if the Court cannot draw a distinction between that case and this one. *Flast* is starkly inconsistent with standing doctrine in other contexts, where the Court principally asks whether a claim invokes the traditional judicial function of remedying direct, genuine injuries of plaintiffs. In *Flast*, the Court ignored that question and asked only whether the plaintiff would make a good litigant (and offered no explanation why its two-part nexus test was suitable for even that inquiry). *See Flast*, 392 U.S. at 101-02. What is more, the Court in *Flast* found a "nexus" between the Establishment Clause and the Spending Clause only by way of a deeply flawed characterization of the original purposes underlying the Establishment Clause. *See id.* at 103-04. In short, *Flast* has

proven unworkable, and the Court's subsequent decisions have isolated it doctrinally. As a procedural ruling, *Flast* has not generated the sort of public reliance that can justify preserving it solely on grounds of *stare decisis*, so the Court should lay *Flast* to rest once and for all.

ARGUMENT

I. Under the Rule Announced Below, a Growing Number of State Programs Will Be Newly Vulnerable to Establishment Clause Challenges

Like the federal government, state legislatures routinely grant both specific and general appropriations to allow their executive officials to manage the day-to-day activities of the state and to execute various state-policy initiatives. State executives use both general and specific legislative appropriations to create, administer, and participate in programs and activities whereby religious institutions—along with wholly secular groups—benefit from taxpayer funds for purposes of carrying out secular functions.

At least 33 states, including Indiana, have faith-based liaisons or a state office for faith-based and community initiatives. *See* White House Office of Faith-Based & Community Initiatives, *Contact Information—State Liaisons*, *available at* http://www.whitehouse.gov/government/fbci/contactstates.html (last visited Jan. 4, 2007). Indiana's Office of Faith-Based and Community Initiatives, created to ensure that faith-based institutions have equal access to state and federal funding, provides training, technical assistance, and grants to community-based and faith-based organizations. *See* Office of Faith-Based & Community Initiatives, *About Us*, *available at* http://www.in.gov/ofbci/about/index.html (last visited Jan. 4, 2007). Many states have created similar offices by executive order. *See* Ala. Exec. Order No. 21 (June 22, 2004), *available at* http://www.governorpress.state.al.us/pr/ex-21-2004-06-22.asp (last visited Jan. 4,

2007); Ind. Exec. Order No. 05-16, 28 Ind. Reg. 1907 (Mar. 6, 2005); N.J. Exec. Order No. 02-31, 34 N.J. Reg. 3411(a) (Oct. 7, 2002).

To further the aims of these departments and other faith-based social programs, executive officials at all levels of state governments routinely give speeches and participate in public events in order to foster relationships with religiously affiliated groups. For example, in Michigan, Governor Granholm hosted the Second Annual Governor's Faith and Community Based Resource Symposium in August 2006 in order to cultivate relations between government offices and religious organizations in furtherance of various social programs. *See* 2d Annual Governor's Faith & Community Based Resource Symposium, *Building Communities through Faith & Community Partnerships*, *available at* http://www.michigan.gov/documents/OCFBI2006Faithbased-Symposium_163870_7.pdf (last visited Jan. 4, 2007). As shown in the addendum to this brief at Table A, similar examples arise in many other states.

State executives cannot organize, promote, and conduct events of this nature without spending state funds. Under the Seventh Circuit's expansion of the *Flast* doctrine, any expenditure of general appropriations on these initiatives would enable taxpayers to sue on Establishment Clause grounds. *See* Pet. App. 16a.

State executives also frequently find themselves participating in other types of taxpayer-funded events that have religious themes. State officials annually participate in religious holiday ceremonies and celebrations, such as lighting Christmas trees or Chanukah menorahs, along with other religiously affiliated events that likely involve expenditures of taxpayer dollars. For example, Governor Schwarzenegger recently participated in the thirteenth annual Chanukah celebration at the California state capitol. *See* State of California Office of the Governor, *Gov.*

Schwarzenegger Begins Festival of Lights Chanukah Celebration at the State Capitol, *available at* http://gov.ca.gov/index.php?/press-release/4919/ (last visited Jan. 4, 2007). The Governor joined Rabbis and leaders of Chabah, the Jewish organization that sponsored the event, to help illuminate the capitol menorah. *See id.* The Governor even spoke about the meaning of the holiday at a podium bearing his office's seal. *See id.* State executives across the country regularly participate in similar activities. *See* Addendum, at Table B.

Attendance by public officials at religious events has not generally been subjected to judicial scrutiny. At least in part, this is likely because such events are not funded by specific legislative appropriations. However, the fact that these events are often held on state property and involve the participation of state officials very likely means that *some* expenditure of taxpayer dollars occurs, at least insofar as the state provides the site, logistical support, or security. Indeed, it is reasonable to assume that officials are compensated by their states for time spent at such events. Incidental expenditures of this nature have previously been insufficient to warrant taxpayer standing. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968) (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). Under the rule provided below, however, minimal, routine expenditures by state executives from general legislative appropriations may now be subject to federal judicial oversight.

To be sure, the Seventh Circuit attempted to assuage concerns about such lawsuits by distinguishing "incidental" expenditures from those purposely directed to support religion. *See* Pet. App. 12a-15a. For example, the court distinguished the expenses in this case from government support of a State of the Union address where a President makes favorable references to religion. *See* Pet. App. 12a. That official speech, the court observed, would not give rise to taxpayer standing because "the cost to the government of

the preparations, security arrangements, etc., involved in a State of the Union address . . . would be no greater merely because the President had mentioned Moses rather than John Stuart Mill," and "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a.

Yet a Governor's Chanukah celebration—or Christmas tree lighting—might not qualify for the Seventh Circuit's "incidental-expenditures" exception because in those cases the official is participating in activities that consist *solely* of the religious activity alleged to violate the Establishment Clause. So, while this exception would shelter the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address, it arguably would not account for an armored limousine taking Governor Schwarzenegger to a Chanukah celebration—where the marginal cost of the alleged violation would self-evidently *not* be zero. *See* Pet. App. 14a. Thus, many state-government expenditures that are seemingly incidental to routine public appearances by elected officials may potentially be subject to federal judicial inquiry—if not outright control, *cf. Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1109-14 (S.D. Ind. 2005)—if the rule announced by the Seventh Circuit prevails.

II. Federalism Principles Preclude the Level of Federal-Court Supervision Over State Affairs Permitted by the Decision Below

The potential impact that permitting taxpayer standing in this case could have on state-government functions raises troubling federalism issues. As the Court acknowledged just last term, "[d]etermining that a matter before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp.*

v. Cuno, __ U.S. __, 126 S. Ct. 1854, 1860 (2006) (internal quotations omitted). Like principles of separation of powers, principles of federalism shape the limits of that role.

1. Just as federal courts scrutinize federal-taxpayer-standing claims in order to avoid creating a system whereby "'the other departments would be swallowed up by the judiciary,'" *id.* at 1861 (quoting 4 *Papers of John Marshall* 95 (Charles T. Cullen ed. 1984)), so too, federal courts must police state-taxpayer-standing claims to avoid swallowing state-government autonomy. The Framers and the citizens of the Founding Era took very seriously the idea that federal courts should not assume a supervisory role over state governments. When, shortly after ratification, the Court overstepped well understood Article III boundaries and permitted a private citizen of South Carolina to sue Georgia for damages in federal court, *see Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 440 (1793), Congress and the country responded quickly and decisively with the Eleventh Amendment. *See Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890).

The Eleventh Amendment, however, is not the only significant constitutional text for purposes of limiting federal-court oversight of state-government operations. The Court's observation that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), is particularly significant here. What the Eleventh Amendment presupposes is that states are sovereign and may not be sued—in federal court as elsewhere—without their consent. *See id.* State officials, of course, may be sued as proxies, *see Ex parte Young*, 209 U.S. 123, 159-60 (1908), but that does not silence the call for federal courts to exercise restraint when adjudicating state interests. *See, e.g., Younger v. Harris*, 401 U.S. 37, 40-41 (1971) (announcing the rule requiring federal-court abstention from interference with ongoing state-court

law-enforcement proceedings). When *Ex parte Young* applies, the most important protection states have against unjustified federal-court interference with state functions is Article III—the very provision whose silence on the matter was originally thought to preclude federal courts from adjudicating disputes brought by citizens against unconsenting states. *See Hans*, 134 U.S. at 10-21. Article III's general restriction of federal courts to adjudication of "cases" or "controversies" remains a critical component of the Constitution's preservation of state sovereignty.

Accordingly, "under our system of reserved state powers and delegated national powers . . . there [is no] persuasive reason to conclude that the role of the federal judiciary in relation to the representative branches of state government should be greater than with respect to those of the national government." C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 867 (1985). In fact, "[t]here is no principled or historical basis for concluding that the original Constitution, augmented by a Bill of Rights directed literally only to the national government, intended to confer a broader power of judicial review with respect to the actions of state officers than those of federal officers." *Id.* at 867 n.26.

Not even the history of the Fourteenth Amendment, which enabled Establishment Clause incorporation, supports subjecting states to more permissive standing rules. "[T]he history of the Civil War Amendments and the Reconstruction civil rights legislation provides no support for the conclusion that in subjecting the actions of state officers in violation of federal law to broadened federal judicial review and control, there was" also an intent "to alter the understood meaning of a justiciable case." *Id.*

In tune with these principles, the Court has consistently equated federalism concerns with separation-of-powers concerns when faced with a decision whether to expand

federal-court standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (drawing a direct analogy between federalism and separation-of-powers principles); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982) (stressing that Article III "is a part of the basic charter . . . which . . . provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals"). The Court has also relied on federalism principles when rejecting the justiciability of citizen lawsuits for injunctive relief against state officials based only on past conduct. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

Most recently, the Court in *DaimlerChrysler* acted on the notion that the vertical division of power represented by federalism, like the horizontal division of power among the branches of government at the national level, imposes limits on federal-court standing. *See DaimlerChrysler*, 126 S. Ct. at 1863 (observing that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers"). Conferring standing on state taxpayers who cannot show a direct injury would "interpose the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration, contrary to the more modest role Article III envisions for the federal courts." *Id.* at 1864 (quoting *Allen*, 468 U.S. at 760-61).

Nor does *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), represent any sort of departure from principles of federalism for purposes of state-taxpayer Establishment Clause challenges. While some lower federal courts have treated *Doremus* as in invitation to accord standing to all state taxpayers, *see, e.g., Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984), *Doremus* actually *forecloses* state-

taxpayer standing in federal court absent a current or imminent "good-faith pocketbook" injury. *See Doremus*, 342 U.S. at 434. In other words, a state taxpayer must have a claim for disgorgement of paid taxes from a state official—or a claim that a state official is about to deprive the taxpayer of money unlawfully through taxation—in order to sue that official in federal court *as a taxpayer*. *See DaimlerChrysler*, 126 S. Ct. at 1863-64. Of most significance for the present discussion, the Court in *Doremus* relied extensively on the relationship between the states and the federal government and noted that while state courts may entertain public-interest lawsuits brought by taxpayers, federal courts may not. *See Doremus*, 342 U.S. at 434.

2. Unfortunately, lower federal courts have been uneven in their respect for federal/state comity when considering standing arguments. Among those cases respecting federalism, *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988), held that a state taxpayer did not have standing to challenge a state statute authorizing the state to acquire and to finance land on behalf of a private corporation. The court observed that the separation-of-powers concerns that underlie limits on federal-taxpayer standing have "a counterpoint which should be considered when a state taxpayer seeks to have a federal court enjoin the appropriation and spending of a state government. Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an 'all federal' action." *Id.*

Likewise, the Tenth Circuit held that state taxpayers did not have standing to challenge the Governor's alleged use of taxpayer funds to oppose a voter initiative. *See Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992). The court observed that "when state taxpayers attack state spending in federal court," courts must carefully scrutinize whether the taxpayer has suffered the requisite injury because "the integrity of our government's

federalist structure" is at stake. *Id.* at 1403. "Unnecessary or abstract decisions by federal courts in cases where there is no case or controversy could unduly constrict experimental state welfare legislation and undermine local self-determination." *Id.*

Other federal courts, however, have seemingly shown less concern with federalism implications and have undertaken review of even pedestrian state-government activities that are not principally spending programs based only on the thinnest of taxpayer-standing rationales. By way of taxpayer standing, federal courts are now involved in reviewing state holidays, legislative practices, agency Boy Scout sponsorships, capitol grounds nativity scenes and monuments, and student-teacher arrangements, among other activities.[1] In one of these cases, a federal court actually

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[1] *See, e.g., Metzl v. Leininger*, 57 F.3d 618, 618 (7th Cir. 1995) (state taxpayer had standing to challenge Good Friday state holiday); *Cammack v. Waihee*, 932 F.2d 765, 769-72 (9th Cir. 1991) (permitting taxpayers to challenge Good Friday as a state holiday); *Van Zandt v. Thompson*, 839 F.2d 1215, 1217 (7th Cir. 1988) (permitting taxpayers to challenge a resolution of the Illinois House of Representatives to convert space in the state capitol to a prayer room); *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1110 (S.D. Ind. 2005) (taxpayers had standing to challenge Indiana House of Representatives' legislative prayer); *Winkler v. Chicago Sch. Reform Bd. of Trs.*, 2000 WL 44126, at *8 (N.D. Ill. 2000) (allowing Illinois taxpayers to challenge state-agency expenditures to sponsor Boy Scouts); *Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969, 970-71 (W.D. Wis. 1996) (allowing state taxpayers to challenge Good Friday state holiday); *Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694, 696 (D. Minn. 1990) (allowing state-taxpayer challenge to statute allowing public-school students to take coursework at religious post-secondary institutions); *ACLU-Ky. v.*

permitted plaintiffs to proceed as *state* taxpayers under *Doremus* but not as *federal* taxpayers under *Flast*, even though both state and federal expenditures were at issue. *See Winkler*, 2000 WL 44126, at *8.

Such permissive treatment of state-taxpayer lawsuits undermines our federalist structure by involving federal courts in the daily functioning of state bureaucracies. The Court has repeatedly emphasized that federal courts must respect principles of federalism when cases portend judicial regulation of state programs. In *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), for example, the Court refused to impose a tax levy for purposes of desegregation, stressing that "[o]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *See also id.* at 58-59 (Kennedy, J., concurring) (categorically rejecting, on federalism grounds, the power of federal courts to mandate state-tax levies); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("[F]ederal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *O'Shea*, 414 U.S. at 500 (holding that the need for proper balance in the federalist system counsels restraint against granting injunctions against state officers administering state laws) (citing *Younger*, 401 U.S. at 46).

These same concerns apply in Establishment Clause cases, which increasingly threaten to put state-government bodies under federal-court supervision. *See, e.g., Hinrichs v. Bosma*, 2005 WL 3544300, at *2-7 (S.D. Ind. 2005)

Wilkinson, 701 F. Supp. 1296, 1298, 1302-03 (E.D. Ky. 1988) (holding state taxpayers had standing to challenge nativity scene at state capitol); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 n.2 (D. Minn. 1985) (finding state-taxpayer standing to challenge state university's student-teacher program).

(holding, in an entry on a post-judgment motion, that remedies available to state taxpayers are not limited to rectifying their injuries as taxpayers and that, therefore, the court had continuing jurisdiction to regulate how legislative prayers are conducted). Accordingly, the Court should reject the expansion of taxpayer standing invited in this case and continue to articulate how the special respect that federal courts owe to state governments as co-sovereigns limits federal-court jurisdiction.

III. *Flast* is an Unsustainable Departure from the General Rule Against Taxpayer Standing and Should Be Overruled

The Court could decide this case in favor of the government by recognizing that *Flast v. Cohen*, 392 U.S. 83 (1968), cannot be applied to cases challenging the discretionary use of general appropriations without abandoning the rationale that underlies it. As an exception to the general rule against taxpayer standing, *Flast* rests entirely on the notion that *legislative* decisions—not *executive* decisions—concerning spending for religious purposes are at the heart of Establishment Clause history. *See id.* at 102-03. This history does not support the rule announced by the Seventh Circuit in this case. *See* Pet. App. 16a.

On the other hand, if the Court is concerned about fidelity to the philosophical underpinnings of its Article III standing precedents, it should recognize that *Flast* itself departs from the principle that federal courts exist to redress injuries and not simply to enforce the Constitution by abstract decree. *See Frothingham v. Mellon*, 262 U.S. 447, 488-89 (1923). As Justice Harlan explained in his dissent in *Flast*, broad recognition of taxpayer standing allows plaintiffs to sue not really as injured taxpayers, "but as private attorneys-general." *Flast*, 392 U.S. at 119 (Harlan, J., dissenting). In such cases, "[t]he interests that [the taxpayer plaintiffs] represent, and the rights they espouse,

are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike." *Id.* at 119-20 (Harlan, J., dissenting). Thus, the Court should "come[] to grips" with the reality "that taxpayers' suits under the Establishment Clause are not in these circumstances meaningfully different from other public actions." *Id.* at 128 (Harlan, J., dissenting).

Because *Flast* cannot be squared with the limited judicial role of redressing concrete individual injuries, the Court should overrule it. Only by doing so may the Court avoid recurrent demands to explain why only *Establishment Clause* challenges to *Spending Clause* actions may be brought by the merely offended. *Cf. Daimler Chrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1864-65 (2006) (explaining why *Flast* does not apply to Commerce Clause cases).

A. *Flast* Cannot Be Reconciled with the Separation-of-Powers Principles that Otherwise Govern Federal-Court-Standing Limits

Flast has always been out of step with the rest of Article III standing doctrine, and subsequent cases have only exacerbated its isolation by stripping it of both jurisprudential and historical support as a proper embodiment of Article III values. By now, *Flast* has been exposed as a dead-end detour around legitimate Article III barriers to the use of federal judicial power.

1. From the moment the Court staked out its role reviewing acts of the other branches of government, it has been careful to limit itself to resolving cases where something concrete—some real-world personal injury—is at stake. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), the Court announced the doctrine of judicial review only *after* carefully explaining that "[t]he province of the court is, solely, to decide on the rights of individuals, not to

enquire how the executive, or executive officers, perform duties in which they have a discretion."

This understanding of the limitations on the judicial function animated the rejection of taxpayer standing in *Frothingham*. There, and in other cases prior to *Flast*, the Court spoke of standing in terms of the plaintiff's injury. *See Frothingham*, 262 U.S. at 487-89. Taxpayer interests are interests of the public, not of individuals, the Court observed, so to decide a constitutional issue without a plaintiff who suffered an individualized direct injury "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which we plainly do not possess." *Id.* at 489; *see also Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (stating that a plaintiff who cannot show direct injury and merely suffers in some indefinite way in common with others cannot invoke the powers of the federal courts); *Ex parte Levitt*, 302 U.S. 633, 636 (1937) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action" and "it is not sufficient that he has merely a generally interest common to all members of the public.").

Similarly, in *Poe v. Ullman*, 367 U.S. 497, 503-05 (1961), the Court dismissed a challenge to a Connecticut law prohibiting advice regarding contraception and contraceptive devices because the plaintiffs did not stand to suffer a direct injury. The Court observed that "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.* at 504; *see also Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (holding that voters alleged a

sufficient direct injury to support standing by alleging vote dilution).

2. *Flast* should be overturned because it does not follow the principles set forth in these cases. *Cf. Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), because it "departs from historical principles"); *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), because it "deviated sharply from our established federalism jurisprudence"). While acknowledging that *Frothingham* rejected taxpayer standing as inconsistent with the Article III conception of judicial power, *Flast* ultimately ignored it and other precedents when it disjoined standing from separation-of-powers concerns: "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast*, 392 U.S. at 100; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 891 (1983) ("Never before had the doctrine of standing been severed from the principles of separation of powers.").

The Court instead proceeded from the understanding that courts are concerned with standing only to ensure the parties will *litigate* a case properly. *See Flast*, 392 U.S. at 99-100. Quoting *Baker*, 369 U.S. at 204—where the plaintiff proved individual, if novel, injury—the Court in *Flast* opined that what was really important for standing was that the plaintiff had "'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast*, 392 U.S. at 99. In other words, standing was now about judicial utility, not judicial role. The Court supplied no rationale for this alternative foundation for the

rules of standing. *Cf. Crawford*, 541 U.S. at 62 (criticizing and overruling *Roberts*, 448 U.S. at 66, for "replac[ing] the constitutionally prescribed method of assessing reliability with a wholly foreign one").

Based on this radically recast predicate concern, the Court relied on a supposed "nexus" between taxpayers and the Congressional powers to tax and spend as evidence that the taxpayer plaintiff would be a sufficiently useful litigant. *See Flast*, 392 U.S. at 102-03. *Flast*, however, provided no real explanation as to how there is a "nexus" between taxpayer status and congressional *spending* (as opposed to *taxation*) or how any such "nexus" equates with "'concrete adverseness which sharpens the presentation of issues.'" *Id.* at 99. The Court cited only *McGowan v. Maryland*, 366 U.S. 420, 429-430 (1961), for the general proposition that "our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast*, 392 U.S. at 101-02. *McGowan*, however, was an appeal from a state criminal conviction for violation of Sunday closing laws. *See McGowan*, 366 U.S. at 429-32. The only "standing" issue had to do with the rights the criminal defendant could invoke once in court, not with whether he had suffered an injury sufficient to invoke Article III judicial power.[2]

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[2] *McGowan* is a curious precedent for the *Flast* Court to have cited for the added reason that, if anything, it demonstrates how Establishment Clause challenges are available to others besides taxpayer plaintiffs. *See McGowan*, 366 U.S. at 422-23; *see also Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 240-41 n.5 (1968) (adjudicating an Establishment Clause challenge brought by a school board seeking a declaration that a state textbook law was unconstitutional and an injunction to prevent a state official from removing them if they did not enforce the law).

Commentators—including some who favor expanding access to federal courts—find only frustration in trying to reconcile *Flast* with the direct-injury requirement. One writer explains that if a plaintiff must have a personal stake in the outcome of litigation, *Flast* "become[s] incomprehensible, for the opinion devoted not one word to demonstrating Mrs. Flast's actual monetary stake as a taxpayer, and it is doubtful that the Court could have made such a demonstration." Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 661 (1973). Neither of the *Flast* standing requirements—(1) a nexus between status and claim and (2) a specific constitutional limitation on the exercise of the spending power—in any way "assure[s] the personal stake and concrete adverseness necessary to satisfy Article III requirements; there is simply no necessary connection between taxpayer status and the stake one has or feels in establishment issues." *Id.*; *see also Flast*, 392 U.S. at 119-20 (Harlan, J., dissenting); Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue under the Establishment Clause*, 11 Ga. St. U. L. Rev. 495, 496, 529-30 (1995) (urging broader standing, but stating that "the fact remains that a *Flast* plaintiff realistically has nothing more to gain from a lawsuit than the satisfaction of helping enforce the dictates of the Constitution").

3. Nor does *Flast* hold together on its own. For starters—to focus on the precise distinction at issue in this case—*Flast* does not countenance taxpayer lawsuits against *all* government spending, but only against spending that arises from use of the Article 1, § 8 Spending Clause power. In particular, the Court said, "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast*, 392 U.S. at 102. The only apparent rationale for this rule was the need to distinguish *Doremus*, where the Court ruled that general overhead expenditures were an insufficient basis

for a taxpayer lawsuit challenging daily Bible reading at a public school. *See Doremus*, 342 U.S. at 431.

Similarly, the decision to limit taxpayer challenges to those predicated on "specific constitutional limitations on the taxing and spending power" and not the *inherent* limits of that power appears to have been necessary to distinguish *Frothingham*, where the taxpayer-plaintiff alleged that a particular congressional expenditure lay beyond the power conferred by Article I, § 8.[3] *See Flast*, 392 U.S. at 104-05. At the same time, *Flast* distinguished *Frothingham*'s due-process claim only by undertaking the forbidden practice of adverting to the merits—or lack thereof—of such a hypothetical claim. *See id.* at 104-05. Thus, *Flast* apparently rests on a series of *ad hoc* distinctions from past cases rather than a set of coherent constitutional principles. *See id.* at 124 (Harlan, J., dissenting) (observing that the Court is "compelled simply to postulate situations in which such taxpayer plaintiffs will be 'deemed' to have the requisite 'personal stake and interest'").

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[3] The *Flast* Court purported to distinguish Spending Clause challenges on the theory that in such cases taxpayers are really invoking the reserved-powers rights of states. *See Flast*, 392 U.S. at 104-05. This argument is not only seemingly at odds with the text of the Tenth Amendment (which reserves unenumerated powers to both the states "or to the people"), but also conflicts with earlier decisions of the Court. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 286 (1936); *Bailey v. Drexel Furniture*, 259 U.S. 20, 36 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 269 (1918), *overruled by*, 312 U.S. 657 (1941) (all permitting individuals to assert that Congress exceeded its enumerated powers). *Cf. City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *Printz v. United States*, 521 U.S. 898, 905 (1997); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (same).

An even deeper problem is the Court's asserted historical rationale for permitting taxpayers to bring Establishment Clause claims, but not claims based on other constitutional limits. The Court drew a connection between the Establishment Clause and the Spending Clause because "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. Continuing, the Court explained that

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

Id. (quoting 2 *Writings of James Madison* 183, 186 (Gaillard Hunt ed. 1901)).

This history, said the Court, means that "[t]he Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8." *Flast*, 392 U.S. at 104.

The logic embracing taxpayer lawsuits predicated on the Establishment Clause, but not on the inherent limits of the Spending Clause, thus proceeds as follows: (1) the "general powers" of Article I, § 8—including the Spending Clause—are not self-limiting; (2) Madison, in his role as "the leading

architect of the religion clauses of the First Amendment," was motivated by an intense objection to taxation in support of religious establishments; and (3) the Establishment Clause is, first and foremost, a limit on the Spending Clause.

Even setting aside the logical gap between historical offense at establishment *taxation* and lawsuits to prohibit establishment *expenditures*, each of these premises is false. The Court's rendition of constitutional history in *Flast* oversimplifies and misstates the reasons for Madison's support of the Bill of Rights and ignores his views concerning Congress's Article I, § 8 powers. Madison originally *opposed* adding a Bill of Rights as both unnecessary and potentially dangerous. *See* Akhil Reed Amar, *The Bill of Rights* 40 (1998). Specifically, Madison (like many of the Founders) was of the view that the power to establish a national church was not among those delegated to Congress by Article I, § 8, and an amendment specifically prohibiting it would imply powers that never existed. *See id.* at 41. A specific anti-establishment amendment to the Constitution, therefore, was not necessary to prevent Congress from encroaching on state-establishment prerogatives (which was the concern that originally justified the Establishment Clause). *See id.* What is more, when Madison ultimately changed his mind about the Bill of Rights for political reasons, he came to view the Establishment Clause as confirming extant limits *not* of the *Spending* Clause, but of the *Necessary and Proper* Clause. *See id.* at 40.

So, even assuming the validity of the two-part nexus test, *Flast* got it wrong about the Establishment Clause: There is no historical basis for inferring that Madison thought the Spending Clause to be unlimited or even that he meant for the Establishment Clause to limit it in particular. Accordingly, there is no basis for treating Establishment Clause lawsuits more liberally for purposes of standing than any other taxpayer lawsuits. *See* Louis Lusky, *By What*

Right 177 (1975) ("The mystifying question is how the *Flast* rule can be logically confined to *specific* limitations."); *see also* 15 James Wm. Moore, *et al.*, Moore's Federal Practice § 101.60[6][b] (3d ed. 1999) (arguing that *Flast* is a "constitutional *non sequitur*").

4. Since *Flast*, the Supreme Court has reunited standing with separation-of-powers concerns and, in so doing, has effectively left *Flast* behind as a withered husk limited to its own facts. *See* Scalia, *supra*, at 898 ("*Flast* has already been limited strictly to its facts . . . ."); *see also Korioth v. Briscoe*, 523 F.2d 1271, 1277 (5th Cir. 1975) (referring to the "fading *Flast* doctrine"). Indeed, it was not long after *Flast* that both *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 n.8 (1974), and *United States v. Richardson*, 418 U.S. 166, 171-174 (1974), re-established the primacy of *Frothingham* and rejected taxpayer standing.

The trend toward recognizing only traditional "Hohfeldian" plaintiffs, *see Flast*, 392 U.S. at 119 (Harlan, J., dissenting), continued in *Valley Forge*, where the Court rejected taxpayer standing to assert an Establishment Clause violation through a transfer of property to a religious group, underscoring the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982). And in *DaimlerChrysler*, the Court said that *Flast* has a "narrow application in our precedent" and is strictly limited to challenges to "congressional action under the taxing and spending clause." *DaimlerChrysler*, 126 S. Ct. at 1865.

It is important to observe that the bases for distinguishing *Flast* in *Richardson* and *Valley Forge*—*i.e.*, that something other than Congress's exercise of its spending power was at stake—"seem utterly irrelevant to what *Flast* sought to accomplish." Scalia, *supra*, at 898. Thus, while the Court has adhered to *Flast* as a matter of *stare decisis*, *see Bowen*

v. Kendrick, 487 U.S. 589, 618 (1988), it is equally clear that it has since rejected *Flast* as precedent for the proposition that standing is not a separation-of-powers concern. *See Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) ("*Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from."). The Court now consistently emphasizes that separation-of-powers and federalism concerns dictate adherence to the Article III injury-in-fact requirement. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615-16 (1989); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-90 (1973).

Thus, the Court has now made it crystal clear that plaintiffs must show that they are genuinely injured before invoking the power of the federal courts. Without such limits, the Court has cautioned, federal courts would become "'virtually continuing monitors of the wisdom and soundness of Executive action,'" which "'is not the role of the judiciary.'" *Allen*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). As Judge Easterbrook observed in his concurrence in the denial of rehearing *en banc* in this case, the different treatment of standing principles in *Flast* and in the Court's subsequent decisions appears to be "arbitrary" and "illogical." Pet. App. 62a (Easterbrook, J., concurring in the denial of rehearing *en banc*). There is no good reason to perpetuate this arbitrariness any longer.

B. Overruling *Flast* Would Be Consistent with the Court's *Stare Decisis* Doctrine

When the Court considers whether to overrule precedent, its decision "is customarily informed by a series of prudential and pragmatic considerations," including (1) "whether the rule has proven to be intolerable simply in defying practical workability," (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992).

Taking the last two considerations first, as discussed above, *see* Part III.A.4, *supra*, the Court repeatedly refuses to use—and even criticizes, *see Lewis*, 518 U.S. at 353 n.3—the *Flast* standard. *See also DaimlerChrysler*, 126 S. Ct. at 1864-65 (2006) (refusing to apply *Flast* to a taxpayer's Commerce Clause claim). Also, historical events must now be seen in a way that negates whatever justification *Flast* originally had. *See* Amar, *supra*, at 40-41 (reciting facts that cast doubt on the *Flast* Court's version of Establishment Clause history). The remaining two considerations—workability and reliance interests—also support abandoning *Flast*.

1. *Flast* has proven unworkable, as it is clear that lower courts are generally confused about how to apply it. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 835-40 (2003) (reporting uneven application of taxpayer-standing doctrine). This Court has had to correct erroneous lower-court applications of *Flast* several times. *See*

DaimlerChrysler, 126 S. Ct. at 1863-64; *Valley Forge*, 454 U.S. at 479-80; *Schlesinger*, 418 U.S. at 212; *Richardson*, 418 U.S. at 167-68. And even as far back as *Richardson*, Justice Powell stated that he would "lay to rest the approach taken in *Flast*" rather than "perpetuate the doctrinal confusion" it created. *Id.* at 180 (Powell, J., concurring).

Even more troubling, lower federal courts often treat the invocation of taxpayer status as an automatic pass from substantive standing analysis. *See, e.g., Coal. to End the Permanent Congress v. Runyon*, 796 F. Supp. 549, 551, 558 n.8 (D. D.C. 1992), *overruled by*, 971 F.2d 765 (D.C. Cir. 1992) (failing to address taxpayer standing); *L.S.S. Leasing Corp. v. U. S. Gen. Servs. Admin.*, 579 F. Supp. 1565, 1572 n.3 (S.D.N.Y. 1984) (failing to address standing). In a recent empirical study of federal-court taxpayer standing, Professor Nancy C. Staudt concluded that a federal-court plaintiff asserting state taxpayer standing has nearly a 50% chance of being granted standing without asserting a First Amendment violation, and a 63% chance regardless of the claim. *See* Staudt, *supra*, at 824.

When courts do address taxpayer standing, the decisions have shown that federal judges cannot agree on *Flast*'s meaning, as evidenced by the circuit conflict precipitating review in this case. *Compare* Pet. App. 1a-16a *with In re U.S. Catholic Conference*, 885 F.2d 1020, 1027-28 (2d Cir. 1989) (no taxpayer standing because alleged action or inaction by the IRS is not a challenge to Congress's taxing and spending power); *Am. Jewish Congress v. Vance*, 575 F.2d 939, 945 (D.C. Cir. 1978) (no standing when taxpayer plaintiffs can point only to the expenditure of funds by executive officials); *Pub. Citizen, Inc. v. Simon*, 539 F.2d 211, 214 (D.C. Cir. 1976) (executive spending does not fit the second requirement of *Flast*, that the enactment in question exceeded specific constitutional limitations imposed on Congress). *Flast* also frequently gives rise to *intra*-court disputes. *See* Pet. App. 16a-26a (Ripple, J., dissenting); 59a

(Flaum, J., concurring in the denial of rehearing *en banc*); 59a-62a (Easterbrook, J., concurring in the denial of rehearing *en banc*); 63a-66a (Ripple, J., dissenting from the denial of rehearing *en banc*); *Laskowski v. Spellings*, 443 F.3d 930, 939 (7th Cir. 2006) (Sykes, J., dissenting); *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (Magill, J., dissenting); *Am. Jewish Congress*, 575 F.2d at 949 n.7 (Spottswood, J., dissenting); *Pub. Citizen, Inc.*, 539 F.2d at 219 (McMillan, J., dissenting).

In addition, *Flast* has led to idiosyncratic results. At least until *DaimlerChrysler*, some federal courts allowed taxpayer standing for non-Establishment Clause claims. *See Coal. to End the Permanent Congress*, 796 F. Supp. at 551, 556-58 (First and Fifth Amendment challenge to Congressional franking privileges); *L.S.S. Leasing Corp.*, 579 F. Supp. at 1567 (NEPA challenge to the construction of government buildings); *Wamble v. Bell*, 538 F. Supp. 868, 869 (W.D. Mo. 1982) (Fifth Amendment challenge to government funding of religious schools); *Sch. Dist. of Philadelphia v. Pa. Milk Mktg. Bd.*, 877 F. Supp. 245, 248, 251 (E.D. Pa. 1995) (Commerce Clause challenge to state practice of setting milk prices).

More recently, an Indiana federal court relied on minute expenses for correspondence, photos, and webcasting to regulate, at the behest of a few state taxpayers, prayers in the Indiana House of Representatives. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1109-14 (S.D. Ind. 2005); *see also Hinrichs v. Bosma*, 440 F.3d 393, 396-98 (7th Cir. 2006) (denying stay of district court's injunction pending appeal based in part on a preliminary determination that the district court reached the correct decision on taxpayer standing). And the Seventh Circuit has ruled that state taxpayers may sue government grant recipients to disgorge funds received as part of a program that violates the Establishment Clause, even where the grant has expired and the government does not want the money. *See Laskowski*, 443 F.3d at 933-34.

These discomfiting trends demonstrate that lower federal courts find the logic of *Flast* inscrutable—and therefore unworkable—as a constitutional standard. The source of their confusion is as obvious as it is resilient. As discussed in Part III.A., *supra*, *Flast* is, and has been from the very beginning, incomprehensible both as an exegesis of Article III principles and on its own terms. Because *Flast* has no serious historical or jurisprudential rationale, it is no wonder that the test it fabricated has proven elusive in practice. This is an exceedingly important reason to overrule *Flast* now. *Cf. Seminole Tribe*, 517 U.S. at 64 ("Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to apply the deeply fractured decision.").

2. As to the collateral ramifications of overturning *Flast*, it is implausible that *Flast* has induced special reliance on its generous federal-court-standing rule. In fact, "it is hard to imagine" how anyone could rely on *Flast* in any meaningful way or how any reliance "could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004).

In this regard, it is important to bear in mind that, while Article III standing rules implicate constitutional norms, they are still procedural rules. Standing rules do not, for example, embody substantive rights concerning individual autonomy. *See Casey*, 505 U.S. at 847-51. In the recent past, the Court has overturned multiple precedents concerning constitutional procedural norms. *See Crawford*, 541 U.S. at 60-62 (overruling *Roberts*, 448 U.S. at 66); *Ring v. Arizona*, 536 U.S. 584, 608-09 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Seminole Tribe*, 517 U.S. at 64 (overruling *Union Gas*, 491 U.S. at 1). Even with respect to Establishment Clause issues, the Court has not been deterred by reliance interests from overturning prior decisions. *See Agostini v. Felton*, 521 U.S. 203, 208-09 (1997) (overruling

Aguilar v. Felton, 473 U.S. 402 (1985)). In short, with respect to *Flast*, there are no noteworthy reliance interests to add to the "cost of repudiation." *Casey*, 505 U.S. at 854.

* * * *

It may be that the Court can reverse the decision below simply by distinguishing this case from *Flast*. However, if the Court discerns no real justification for, or end to logic of, *Flast*—or if the Court concludes that it *cannot* distinguish *Flast*—this case presents an opportunity to reject it entirely. *See Crawford*, 541 U.S. at 60-62 (overruling *Roberts*, notwithstanding the ability to distinguish it). The Court should apply standing rules in Establishment Clause cases that, as in other areas of constitutional litigation, are consonant with the limited role of federal courts as remediators of genuine individual injuries.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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ADDENDUM

Table A

State Conferences Where Faith-Based Groups Learn to Apply For and Administer Government Grants

State	Event	Citation
Alaska	Faith-Based & Community Initiatives Conference	http://ltgov.state.ak.us/fbci/conference.php
Alabama	Grant and Funding Resource Conference	http://www.servealabama.gov/PDFs/Faith%20Based%20Loop/issue%20I%20volume%20IX%20correction.pdf
Arkansas	Foundation for the Mid South 2nd Annual Pastoral and Community Leadership Conference "The Power of Entrepreneurial Faith"	http://www.arkansas.gov/faith/events.html
Hawaii	Hawaii Faith-Based and Community Initiative Conference	http://starbulletin.com/2005/10/18/news/story05.html
Indiana	2006 Faith Based Conference "A Challenge to Excellence"	http://www.in.gov/ofbci/events/sept06.html
Maryland	Second Local Government Grants Conference	http://www.gov.state.md.us/grants/jan06conf.html

State	Event	Citation
Michigan	Faith-Based Resource Symposium	http://www.michigan.gov/ documents/OCFBI-2006-Faithbased-Symposium_163870_7.pdf
Missouri	Community and Faith-based Employment Initiative Presented at Governor's Conference on Workforce Development	http://ded.mo.gov/cgi-bin/dispress.pl?txtpressid=1778
New Jersey	Annual Faith and Community Based Resource Expo	http://www.nj.gov/state/faith/acc2.html
Ohio	"Promising Partnerships Conference" sponsored by the Governor's Office of Faith-Based and Community Initiatives	http://governor.ohio.gov/releases/Archive2004/102704faith.htm
Texas	29th Annual Governor's Volunteer Leadership Conference	http://www.onestarleadership.com/onestar/events/

Table B

Religious Events Attended by State Officials

State	Official	Event	Citation
Alabama	Governor	"Every Light a Prayer For Peace" Christmas Tree Lighting	http://www.governorpress.alabama.gov/pr/pr-2006-12-01-04-christmas_tree-photo.asp
Arkansas	Secretary of State	Lighting State's Official Christmas Tree	http://www.sos.ar.gov/holidays2006/index.html
California	Governor	Lighting of Capitol Menorah; 75th Annual Capitol Christmas Tree; "Miracle on First Street Toy Giveaway"	http://gov.ca.gov/index.php?/press-release/4919/; http://gov.ca.gov/index.php?/fact-sheet/4858/; http://gov.ca.gov/
Georgia	Governor	Governor to light "Christmas Tree"	http://www.gov.state.ga.us/press/2006/press1304.shtml
Hawaii	Governor	Menorah Lighting	http://www.hawaii.gov/gov

State	Official	Event	Citation
Idaho	Governor	Annual Capitol Christmas Tree Lighting Ceremony	http://gov.idaho.gov/mediacenter/press/pr2006/prnov06/pr_143.html
Illinois	Governor	Christmas Tree Lighting Ceremony	http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=5589
Iowa	Lieutenant Governor	Holiday Tree Lighting Ceremony	http://www.governor.state.ia.us/news/2004/november/november2404_1.html
Louisiana	Governor and Secretary of State	Third Annual Candle Light Vigil; Christmas Lighting Ceremony	http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=1620; http://www.sos.louisiana.gov/admin/press/p110701-osc.HTM
Massachu-setts	Governor And Lieutenant Governor	Christmas Tree Lighting	http://www3.whdh.com/news/articles/local/BO36962/
Michigan		Capitol Christmas Tree	http://www.lsj.com/apps/pbcs.dll/article?AID=/20061130/NEWS04/611300345/1005/news04

State	Official	Event	Citation
Montana	Governor	Holiday Tree Lighting	http://governor.mt.gov/news/pr.asp?ID=403
Nevada	Governor	Christmas Tree Lighting	http://nv.gov/2006ChristmasLighting/index.htm
North Carolina	Governor	Christmas Tree Lighting	http://www.ncdcr.gov/news/2006/HS11_30_2006.asp
North Dakota	Governor	State Christmas Tree Lighting	http://www.state.nd.us/arts/newsletters/press_releases.htm
Ohio	Governor	Statehouse Tree Lighting Ceremony	http://governor.ohio.gov/section4-2.htm
Oregon	Governor	Capitol Tree Lighting Ceremony	http://www.leg.state.or.us/capinfo/cac_121806.html
Pennsylvania	Governor	Capitol Tree Lighting Ceremony	http://www.governor.state.pa.us/governor/CWP/view.asp?A=1115&QUESTION_ID=445231
Rhode Island	Governor	Annual Tree Lighting Ceremony	http://www.ri.gov/GOVERNOR/view.php?id=3082
South Carolina	Governor	Governor's Holiday Events	http://www.scgovernor.com/interior.asp?SiteContentId=20&pressid=42&NavId=93&ParentId=54

State	Official	Event	Citation
Utah	Governor	Christmas Lighting event	http://demo.utah.gov/firstlady/news/2005/news_12_0605.html
Vermont	Governor	Cuts Down Christmas Tree	http://www.vermont.gov/tools/whatsnew2/index.php?topic=GovPressReleases&id=1612&v=Article
Washington	Governor	Menorah Lighting Ceremony Tree Lighting Ceremony	http://www.atg.wa.gov/releases/2006/rel_GA_Decorations_122806.html
West Virginia	Governor	State Christmas Tree Lighting Ceremony	http://www.wvgov.org/joyfulnightgallery.cfm
Wisconsin	Governor	Lighting of Capitol Tree	http://www.doa.state.wi.us/news_detail.asp?onid=33